SUPREME COURT OF THE UNITED STATES,

January Term, 1903.

THOMAS W. POTTER, APPELLANT,

VS.

MARY HALL.

BRIEF OF APPELLEE.

DOES THE ANSWER AND CROSS PETITION FAIL TO STATE THE FACTS FOUND BY THE LAND DEPARTMENT?

The opinion rendered by the Register and Receiver, the decision of the Honorable Secretary of the Interior, and the decision of the Acting Secretary, are set forth in the said cross-petition. (See printed record, pages 7 to 10.) The facts are the same in each of these opinions or decisions. It is alleged in the cross-petition that the final decision (that of the Acting Secretary) was rendered upon the facts as found by the Register and Receiver, and that these facts are identical with

those shown in the several opinions attached to the cross-petition. (See printed record, p. 6.) The decision of the Secretary of the Interior purports to set forth the facts found by the Commissioner of the General Land Office. But if the facts alleged are not the facts as found by the Land Department, the demurrer did not raise the question.

DOES THE ANSWER AND CROSS-PETITION FAIL TO SET FORTH SPECIFICALLY THE MISTAKE OF LAW BY THE DEPARTMENT, BUT FOR WHICH MISTAKE THE LAND WOULD HAVE BEEN AWARDED TO THE APPELLEE?

It is alleged in said cross-petition that in the proceedings before the Land Department the right of Thomas W. Potter to said lands was "also contested upon the ground that he was disqualified to enter said tract of land because of the fact, first, that said land was a part of the public domain ceded to the United States by the Muscogee or Creek nation, which session was ratified by act of Congress approved March 1, 1889, and opened to settlement by proclamation of the President of March 3, 1889, and, second, because said Thomas W. Potter had, after the 1st day of March, 1889, and prior to noon of April 22, 1889, entered upon said land

so opened to settlement." It is further alleged that the Register and Receiver "found the fact to be that the said plaintiff (Thomas W. Potter) had entered said land between said dates and was, therefore, under the statutes, disqualified to make settlement or homestead entry thereon." It is alleged that this finding, upon successive appeals in the Department, was affirmed, but that upon motion for review the Acting Secretary held that such facts did not disqualify the plaintiff, and revoked the decision of the Hon. Secretary of the Interior, when on the facts found and stated in the opinion, under the law, the decision of the Secretary of the Interior should have been affirmed and the land awarded to Gilman C. Hall (then the entryman, the appellee being his widow.) (See printed record, pages 5 and 6.) The cross-petition clearly shows that the land would have been awarded to the appellee, but for the erroneous decision that the undisputed fact of Potter's entry upon the land during the prohibited period did not disqualify him to homestead the same. The Act of Congress is referred to, and the fact showing Potter's violation thereof (as found by the Department) are clearly stated, and it is alleged that the final decision upon these facts was erroneous. This would seem to be sufficient.

WAS THE CROSS-PETITION INSUFFICIENT BECAUSE OF FAILURE TO OFFER TO RESTORE TO THE PLAINTIFF THREE DOLLARS FIFTY-SIX CENTS LAND OFFICE FEES, SHOWN BY HIS PETITION TO HAVE BEEN PAID BY HIM IN ACQUIRING TITLE FROM THE GOVERNMENT?

Potter filed petition in ejectment, against appellee to recover possession of the land in question, on which she has resided since her husband, now deceased, initiated his right thereto under the homestead laws. To his petition he attached a land office receipt showing the payment of three dollars fifty-six cents land office fees of some kind, and alleged that he acquired title from the United States under section 2291 of the Revised Statutes. This receipt was attached merely as evidence of his title, and constituted no part of the statement of his cause of action. But he now contends that the cross-petition should have contained an offer to refund the amount shown by the receipt. (For copy of receipt see printed record page 4.) He rests his contention upon the maxim that he who seeks equity must do equity. What is this "equity" which a party appealing to a court of chancery must do before he is entitled to relief? If it be not such as Potter might have enforced by some proceeding, either at law or in equity,

in case Mrs. Hall had not filed her cross-petition, then it does not come within the rule that he who seeks equity must do equity. Otis vs. Gregory, 111 Ind., 504-510, 13 N. E. 36; Beach, Mod. Eq. Pr., vol. 1, 13-14; Finch vs. Finch, 10 Ohio St., star page 501-508. Clearly the rule does not apply, Potter had no cause of action again Mrs. Hall for the three dollars and fifty-six cents.

The cross-petition shows, among other things, long continued and expensive litigation between these two parties, before the Land Department, in attempt to acquire title to this land. When the circumstances show that an offer would have been rejected, no offer need have been made. 3 Ency. P. & P., 368; Caldwell vs. Dulin, 22 Ga. 15. The circumstances shown in this case indicate that such offer would have been rejected.

It is said that even under the chancery practice the offer to do equity is but a matter of form, and not of substance; and that a demurrer will not lie for failure to make the offer, unless the rules of the court require it. 6 Ency. P & P., 480; Beach, Mod. Eq. Pr., Vol. 1, 272. The absence of the offer to do equity is not fatal, and the object and purpose of the rule is satisfied by framing the decree so as to impose equitable

conditions upon the relief granted. Thomas vs. Beals, 154 Mass., 51; Shuee vs. Shuee, 100 Ind., 177; Cline vs Vogel, 90 Mo., 239-244; Alexander vs. Merrick, (Ill.), 13 N. E. 190; Farwell vs. Harding, 96 Ill., 32; Loney vs. Courtney, et al, (Neb.) 39 N. W. 616; Sanford vs. Flint, 24 Mich.. 26. The maxim aims at justice, but there is such a thing as invoking its aid in support of equity so trivial and trifling as to make it work injustice. Hence that other maxim, *"de minimis non curat lex."* It was always a ground of demurrer under the equity practice that the value of the subject matter was beneath the dignity of the court. Beach, Mod. Eq- Pr. vol. 1. p. 271. The old limitation from analogy to the English Chancery rule of ten pounds sterling was fifty dollars but never so trifling as three dollars fifty-six cents. Carr vs. Inglehart, 3 Ohio St., 457; Beach, Mod. Eq. Pr., vol. 1, p. 20.

WAS POTTER DISQUALIFIED UNDER THE LAW TO MAKE ENTRY OF THE LAND, BY REASON OF THE FACTS FOUND BY THE LAND DEPARTMENT?

"As the question of Potter's qualifications it is shown that sometime prior to the opening of Oklahoma to settlement, he had been in the employ of the Indian

Agent in charge of the Cheyenne and Arapahoe Agency, which reservation adjoins the Oklahoma land on the west. On the morning of April 22, 1889, he was directed by the Indian Agent to take charge of fifteen Indian police and proceed to the east line of the Cheyenne and Arapahoe reservation and preserve order and prevent any settlement on the same."

"The authority of Potter obtained from the Indian Agent was only coextensive with the Cheyenne and Arapahoe reservation, and did not extend to the Oklahoma land. When he crossed the line onto this tract before the legal hour, he became a trespasser the same as any other person not clothed with authority."

"The fact that he exhibited anxiety to keep this tract clear and exceeded his authority so far as to leave the reservation and order people off this tract, would raise a very strong inference that he had this particular tract in view and intended to settle upon it."

Such are the findings of the Honorable Register who tried the case in the local land office. (See printed record, pages 7 and 8.) Potter's contest was thereupon dismissed, and Hall's entry held intact. On appeal, before the Honorable Secretary of the Interior, whose decision is attached to the answer and cross-petition. (see printed record, pages 9 and 10,) he concluded the same as follows:

"By going into this territory on the morning of April 22, 1889, before the hour when the lands therein

were opened to settlement, he necessarily secured an opportunity to observe the various tracts lying near the line, and the way of reaching them, and this taken in connection with the fact that at the said hour he went directly from the line to the tract in question, makes it plain in my mind that if he did not previously select the said tract in dispute, he obtained information that gave him an advantage over rival claim seekers. It follows under the prevailing rulings that Potter is not qualified to make entry of land in Oklahoma, and that his application must be rejected. The entry of Hall will, accordingly, remain intact."

On motion for review of this decision by the Honorable Secretary, the Acting Secretary aforesaid disposed of the case finally as follows:

"The decision on review sets out a statement of the facts on which its conclusions are based as follows:

"The tract in qnestion formed a part of the lands in Oklahoma which were opened to settlement at noon on April 22nd, 1889. Shortly before this date Potter had been appointed by the Indian agent at the Cheyenne and Arapahoe agency as assistant chief of police, with instructions to proceed to the east line of the reservation to preserve order and prevent any settlement on the same. The said east line of the Cheyenne and Arapahoe reservations is also the west line of the lands opened to settlement, as aforesaid, and is within, possibly a quarter of a mile from the tract in question.

"On the morning of April 22nd, 1889, some three or four hours before the hour of noon, Potter, who it

seems, was at said line, seeing some freighters camping on the tract involved, went thereon and ordered them off, he then returned to the line and at the hour of noon started in the race for the claim. He reached the land before any of his competitors and as he states, commenced his settlement at one-half or one minute after twelve o'clock.

"Accepting this statement as correct and a re-examination of the record satisfies me of its correctness so far as it goes, I scarcely think the conclusion warranted that he necessarily secured an opportunity to observe the various tracts of land lying near the line and the way of reaching them, so that he obtained information that gave him an advantage over rival claim-seekers. He had been employed at the Cheyenne and Arapahoe agency near by since 1883, and for six years before the opening of the country for settlement, he had lived in close proximity to the land in dispute. He had nothing to gain or to learn, therefore, by the short excursion with which he is charged and which it cannot be denied was made in the performance of duty devolved upon him by the orders of the agent who appointed him to the command of the police at that point. He neither gained nor sought advantage and it was error to hold that under the circumstances of his entry into the Territory, he was disqualified thereby." (See printed record, page 10 to 12.)

The acting secretary clearly separates the facts of the case from mere conclusions. He accepted the state-

ment of facts found and set forth in the decision before him for review, and is satisfied with its correctness. He is satisfied with the finding that "Potter was appointed by the Indian Agent at the Cheyenne and Arapahoe agency as assistant chief of police, with instructions to proceed to the east line of the reservation to preserve order and prevent any settlement on the same."

His conclusion, therefore, that Potter's excursion was made in the performance of duty devolved upon him by the order of the agent who appointed him to the command of the police at that point, in a misstatement of the fact already found, and stated by him to the contrary.

The finding that Potter's instructions required him to preserve order on the reservation and prevent settlement thereon, does not warrant the conclusion that Potter was in the discharge of his duty in going into the forbidden territory to prevent settlement there.

We pass this unwarrantable conclusion with the remark that the facts being found the court will draw its own conclusion.

And the facts were found that Potter did not enter the

forbidden land under any authority, or in the performance of any duty; that he was a trespasser; that he did obtain information that was of advantage to him. As a matter of law, and not of fact, it is clear he could not, as assistant chief of the agency police, have any authority or any duty to perform in the forbidden lands. The records show that Potter was an employee of the Indian department, and it must be assumed that he well knew he had no authority to enter upon the Oklahoma land. We have no doubt his purpose was to scan every foot of the line over which he would make the race from the reservation line to the nearest line of the land in question. The race was to be one of speed; it was to be short and sharp; it was not a question of endurance as to horses; it was a matter of solid footing and utmost speed; such a race as where an advantage of a rod in the start would win the race, where a stumble, the swerving of the horse from the line he was pursuing, a slacking of his utmost speed, would lose it. To see every rod of the course over which he would run, to note every hole, every ditch, every pit-fall, to fix with his eye the exact spot where the course would intersect the line of the land in question, and to be so informed as to be able to rush his horse at its utmost speed, with

confidence that there was nothing ahead to fear, and to know exactly when the line had been reached, was information to be appreciated and was longed for by all the men who took part in that break-neck race.

The Honorable Register who tried the case in the local land office, and the Honorable Secretary of the Interior, evidently know what it means to run a spirited horse under the whip over the virgin sod. Advantage? It was the very essence of advantage. To know the course to run, to acquire that information, was the great temptation which made "sooners." The issue must be determined upon the fact that Potter voluntarily and intentionally entered upon the Oklahoma lands during the prohibited period. He admitted it and it was so found by the department. His act brings him squarely within the letter and spirit of the penalty provided.

"Any person who may enter upon any part of said lands in said agreement mentioned, prior to the time that the same are opened to settlement by act of Congress, shall not be permitted to occupy or make entry of such lands or any part thereof."

Sec. 2, Act March 1, 1889, 25 Stat. at Large, Chap. 317, p. 575.

"Until such lands are opened to settlement by proclamation of the President no person shall be per-

mitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto."

Act of March 2, 1889, 25 Stat. at Large, 1005, Chapt. 412.

It is this law which the land department, which the Hon. John M. Reynolds, representing the same, misapplied to the undisputed fact, and of which the President said in his warning proclamation, "The officers of the United States will be required to strictly enforce the provisions of the act of Congress to the above effect." 26 Stat. at Large, 546.

May these provisions be whittled away and the act emasculated? In Smith vs. Townsend, 148 U. S., 490, (L. C. P. Edition, Book 37, p. 533), the court applies the canons of construction, the surrounding circumstances, the history of the times, the defect and mischief which the statute was intended to remedy and say:

"Under such circumstances as these, this legislation was passed, and what in view thereof was the intent of Congress? As disclosed upon the face of this legislation evidently its purpose was to secure equality between all who desired to establish settlements in that country. The language is general and comprehensive: 'Any person who may enter upon any part of said land

* * prior to the time that the same shall be opened to settlement * * shall not be permitted to occupy or make entry of such lands or lay any claim thereto.' No exception is made from the general language of these provisions; and it was evidently the expectation of Congress that they would be enforced in the spirit of equality suggested by the generality of the language."

That is to say, as there is no exception in the language of the statute, there can be none in its enforcement. In that case it was sought to make the point that the statute was penal and must be strictly construed, and if so construed it could not be held that Smith, who resided on the railroad right-of-way during the prohibited period, had entered the lands of Oklahoma, and the court made answer:

"That portion which describes the qualification for entry must be liberally construed, in order that no one be permitted to avail himself of the bounty of Congress, unless evidently of the classes Congress intended should enjoy that bounty. The general language used in these sections indicates that it was the intent to make the disqualifications universally absolute. It does not say 'any person who may wrongfully enter,' etc., but 'any person who may enter,'—rightfully or wrongfully, is implied."

Thus, as we understand it, the qualification is ab-

solute and cannot be frittered away on the theory of "no advantage gained."

The next case decided by the Supreme Court is that of Payne vs. Robinson, 169 U. S. 323 (L. C. P. Edition, Book 42. p. 764), and cites the case of Smith vs. Townsend, supra, with approval.

The case of Calhoun vs. Violet, 173, U. S., 60-95 (L. C. P. Ed., Book 43, p. 614), is squarely in point. This case was appealed from the Oklahoma Supreme Court and affirmed, and we take the facts from the decision in that case (4 Okla. Rep., 321) as follows:

"The testimony of Calvin A. Calhoun himself, as quoted by Messrs. Perkins and Chandler, his attorneys, on pages 17 and 18 of their brief, shows that he arrived at Oklahoma station from Arkansas City on Saturday, April 20, 1889, after dark, and remained there that night, and left for Arkansas City Sunday morning at 8:30 o'clock; that on his arrival at Oklahoma station on Monday, April 22, 1889, he went with his son directly to the tent which his son had erected on the land in contest."

In the decision by the United States Supreme court it is said:

"The fact that the plaintiff had entered the territory prior to the time fixed by the statute and the proclamation of the President, having been conclusively determined, it follows inevitably, as a legal result, that

an entry of land under such circumstances was void, and the ruling of the land department so holding was correct."

This Court in same case said:

"We conclude, therefore, first, that Calhoun disqualified himself from entering or acquiring title to the land in dispute, by reason of having entered upon a portion of the lands thrown open to settlement by the Act of March 2, 1889, after the passage of that act and prior to noon, April 22nd."

The statute makes the fact of non-entry during the prohibited period an additional personal qualification. And like the other qualifications of an entryman, it is absolute and cannot be waived on any ground, and Potter's lack thereof cannot be supplied by showing that he gained no advantage by divesting himself of such qualification. By so doing he clearly disqualified himself, and, in the language of the court, (Smith vs. Townsend), that portion of the statute "which prescribes the qualifications for entry is to be liberally construed in order that no one be permitted to avail himself of the bounty of Congress unless evidently of the classes Congress intended to enjoy that bounty.

The doctrine of "no advantage gained," contended for in this case by appellant, has no place within the meaning of the statute. Patterson v. Willson, et al, (Oklahoma) 65 P. 921.

In each of the above cited cases of Calhoun v. Violet and Patterson v. Willson, it is shown that appellant, who had entered the Territory during the prohibited period, was out at the appointed time for the opening, and came in thereafter. As we understand the facts they are cases in point.

The judgment entered in the court below should be affirmed. Respectfully submitted,

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